IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
	*	**Crim. No. S 92-0301**
	*	
v.	*	**Civil No. S 97-1351**
	*	
MICHAEL MOORE	*	
	*	

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ORDER

For the reasons stated in a Memorandum Opinion entered this date, it is, by the Court, ORDERED:

1. That movant's counsel BE, and hereby IS, ADMITTED PRO HAEC VICE for the purposes of this motion;

2. That movant's motion for relief pursuant to 28 U.S.C. sec. 2255 BE, and it hereby IS, SUMMARILY DENIED AND DISMISSED, pursuant to Rule 4(b), Rules Governing Section 2255 Cases; and

3. That copies hereof and of the said Opinion be mailed to counsel for the movant and to the United States Attorney for this District.

/s/
Frederic N. Smalkin
U.S. District Judge

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MEMORANDUM OPINION

This is a motion under 28 U.S.C. sec. 2255, filed by a federal prisoner, with the assistance of counsel, whom the Court hereby admits pro haec vice to pursue this motion. In that the motion, on its face and together with the files and records of the Court, shows that the movant is plainly entitled to no relief in this Court, a separate order will be made for its summary denial pursuant to Rule 4(b), Rules Governing Section 2255 Cases.

The movant, along with a number of others, was convicted, inter alia, of conspiracy to distribute a controlled substance under 21 U.S.C. sec. 846. Because deaths resulted foreseeably from

the conspiracy, the defendant (and others) had his sentence enhanced under U.S.S.G. sec. 2D1.1(a)(2). Additionally, he was denied a decrease in offense level under U.S.S.G. sec. 3B1.2 for mitigating role. Although an appeal was pursued by counsel on other issues, no appeal was pressed as to either of these sentencing issues.

The present motion, in the realization that these issues are foreclosed from collateral review on the merits by their failure to have been raised on appeal, casts them in the light of violations of the right to effective assistance of counsel on appeal. Nonetheless, and even so cast, the contentions are utterly without merit.

First, although the Court expressed a good deal of frustration with the clumsiness of the Sentencing Guidelines at sentencing, the duty of appellate advocacy applicable under the Sixth Amendment did not require counsel to pursue the issue of

whether U.S.S.G. sec. 2D1.1(a)(2)'s enhancement applies to convictions under 21 U.S.C. sec. 846. Appellate counsel is entitled to a "strong presumption of competence," Evans v. Thompson, 881 F.2d 117, 124 (4th Cir. 1989), especially when it comes to sorting out appellate wheat from appellate chaff. Jones v. Barnes, 463 U.S. 745 (1983). The presumption of attorney competence here is strengthened by the fact that, of the many excellent attorneys who pursued the direct appeal from their clients' sentences in this case, none of them though this issue worthy of an appeal. This is strongly suggestive that it was not outside the bounds of reasonable representation for Mr. Moore's counsel not to have raised the issue. Strickland v. Washington, 466 U.S. 668 (1984). Furthermore, there was no likelihood of success on the issue anyway, in light of the fact that 21 U.S.C. sec. 846 as amended post-Bifulco by Pub.L. 100-690 incorporates

all punishments for the substantive drug object offense into the conspiracy charge. In fact, the Fourth Circuit itself put paid to this issue in the opinion affirming this defendant's conviction, when it observed that the enhancement of U.S.S.G. sec. 2D1.1(a)(2) is applicable "when the penalty provisions of sec. 841(b)(1)(A) are applicable and 'death or serious bodily injury resulted from the use of the substance.'" United States v. Moore, No. 93-5476, slip op. at 2 n.2 (4th Cir. April 21, 1995). If that esteemed court had thought the offense of conviction, rather than the penalty provision, had to be 21 U.S.C. sec. 841, rather than sec. 846, for a sec. 2D1.1(a)(1) enhancement, it could -- - and undoubtedly would -- have said so. It did not. There was, then, no Strickland prejudice. End of discussion as to the first contention.

Movant's second contention is easily disposed of. The Sixth Amendment, as

interpreted in Strickland, did not require counsel to appeal from the denial of a role mitigation adjustment under sec. 3B1.2. The record plainly demonstrated that this movant was not less culpable than "most other participants" or was only minimally culpable. Under these circumstances, this Court's determination could only be revisited on appeal for clear error or abuse of discretion, see, e.g., United States v. Avers, 84 F.3d 382 (10th Cir. 1996). There is no possibility that such a claim could have prevailed on appeal in this case, and, thus, there was neither a lack of competence in not raising it nor any prejudice therefrom, both in the Strickland sense.

For the stated reasons, an order will be entered separately, summary dismissing the present motion.

Dated: April 28, 1997

/s/
Frederic N. Smalkin
U.S. District Judge